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 and USF&G, Defendants

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA for the)
 use of NORTH STAR TERMINAL &)
 STEVEDORE COMPANY, d/b/a NORTHERN)
 STEVEDORING & HANDLING, and NORTH)
 STAR TERMINAL & STEVEDORE COMPANY,)
 d/b/a Northern Stevedoring &)
 Handling, on its own behalf,)

No. A98-009 CIV (TMB)

Plaintiffs,

and

UNITED STATES OF AMERICA for the)
 use of SHORESIDE PETROLEUM, INC.,)
 d/b/a Marathon Fuel Service, and)
 SHORESIDE PETROLEUM, INC., d/b/a)
 Marathon Fuel Service, on its own)
 behalf,)

Intervening Plaintiffs,

and

METCO, INC.,

Intervening Plaintiff,

vs.

NUGGET CONSTRUCTION, INC.; SPENCER)
 ROCK PRODUCTS, INC.; UNITED)
 STATES FIDELITY AND GUARANTY)
 COMPANY; and ROBERT A. LAPORE,)

Defendants.

MEMORANDUM IN SUPPORT
OF NUGGET CONSTRUCTION,
INC.'S AND UNITED STATES
FIDELITY & GUARANTY CO.,
INC.'S OPPOSITION AND
REPLY AGAINST NORTH STAR
TERMINAL & STEVEDORE
CO.'S OPPOSITION AND
CROSS-MOTION TO NUGGET
AND USF&G'S APRIL 28, 2006
MOTION FOR SUMMARY
JUDGMENT AGAINST NORTH STAR

1 Pursuant to Federal Rule of Civil Procedure 56, Defendant Nugget
2 Construction, Inc. ("Nugget") respectfully files herewith its
3 Opposition and Reply to Intervening Plaintiff/Use-Plaintiff North Star
4 Terminal & Stevedore Co.'s ("North Star") Cross-Motion and Opposition
5 to Nugget and USF&G's April 28, 2006 Motion for Summary Judgment
6 Against North Star. For the reasons set forth in Nugget's Motion for
7 Summary Judgment Against North Star ("Nugget's Motion") and as further
8 discussed herein, Nugget is entitled to summary judgment on all of
9 North Star's claims asserted under Alaska state law in North Star's
10 August 31, 2005 Amended Complaint, and North Star's cross-motion
11 seeking summary judgment on several of its Alaska state law claims
12 should be denied because North Star is not entitled to summary
13 judgment as a matter of law on those claims.

14 INTRODUCTION

15 In order to defeat Nugget's motion for summary judgment, North
16 Star shoulders the burden of going beyond the bare allegations in its
17 August 31, 2005 Amended Complaint and setting forth facts with
18 sufficient particularity to establish genuine issues of material fact,
19 or otherwise showing that Nugget was not entitled to summary judgment
20 as a matter of law. Rather than undertake this burden, as it should
21 have if it wished to prevail, North Star instead asks the Court to
22 review its earlier filings relating to motions for summary judgment
23 that have no bearing on the disposition of the Alaska state law claims
24 that are the subject of Nugget's Motion. Then, without adequate
25 references to the current record and, in most instances, without legal

1 support contradicting that offered by Nugget, North Star asks the
2 Court to deny Nugget's motion, resting upon what is essentially a
3 reiteration of the bare allegations set forth in North Star's Amended
4 Complaint.

5 Despite the unfortunate consequence of North Star's Opposition,
6 which was to needlessly complicate matters by blurring the distinction
7 between its federal and state law claims and burden both the Court and
8 Nugget with numerous references to prior filings that are not germane
9 to the resolution of North Star's claims under Alaska state law, two
10 things are certain: first, North Star did not identify any genuine
11 issue of material fact, from either the earlier or the more recent
12 record, on which Nugget's Motion is based, and, second, North Star did
13 not offer any legal authority on which Nugget's Motion should be
14 denied, or on which North Star's partial cross-motion should be
15 granted.

16 A brief review of the procedural history of this case will shed
17 much-needed light upon the significance (or, more precisely, the
18 insignificance) of the earlier filings on which North Star so
19 strenuously relies. Significantly, there have been two orders issued
20 by Judge Holland which were subsequently appealed to the Ninth
21 Circuit, which also issued two Orders. In both instances, the Ninth
22 Circuit reversed and remanded Judge Holland's prior holdings.

23 Judge Holland's first Order that was appealed to the Ninth
24 Circuit was issued on June 3, 1999 ("June 3, 1999 Order"). This Order
25 addressed North Star's motion for summary judgment seeking relief

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1 under two principal theories. Under the first theory, North Star
2 alleged what it described as "direct claims" against Spencer Rock
3 Products, Inc. ("Spencer Rock"), Spencer Rock's then President, Robert
4 A. LaPore, and Nugget. North Star contended that "Spencer Rock
5 entered into an actual or implied in fact contract with North Star for
6 the stevedoring services which were performed, and Robert LaPore
7 personally guaranteed those services." North Star's December 7, 1998
8 Motion for Summary Judgment at 17. North Star also contended that
9 "Nugget is liable to North Star both under contract, express and/or
10 implied, and under plaintiff's remedies in quantum meruit, since
11 Nugget clearly stepped into Spencer Rock's shoes, primarily to benefit
12 itself and secure its source of stone necessary for the Homer Spit
13 Project." *Id.* at 18-19. North Star neither cited any legal authority
14 for its "direct claims," which constituted only two pages of its 32
15 page motion, nor identified whether these claims were being made under
16 federal or state law.

17 Under its second theory, which constituted the bulk of its
18 motion, North Star contended that "[a]t the very least, North Star is
19 entitled to recovery against Nugget and USF&G, Nugget's surety, under
20 the Miller Act." *Id.* at 19. North Star's recovery under the Miller
21 Act turned on the issue of whether Spencer Rock was a subcontractor or
22 material supplier to Nugget. If deemed a subcontractor, Miller Act
23 liability could be construed to extend from Nugget to North Star,
24 which would not be so if Spencer Rock were deemed a material supplier.

1 Judge Holland concluded that North Star was "not entitled to
2 summary judgment on its contract [direct] claims," reasoning that (i)
3 "it is just not clear whether North Star took on Spencer Rock, or
4 Nugget Construction, or both of them as a direct customer for its
5 stevedoring service," and (ii) "as to the North Star quantum meruit
6 claim, the other contract disputes between the parties are
7 sufficiently convoluted that it is simply not possible to say at this
8 time whether or not one or both of Spencer Rock or Nugget Construction
9 might ultimately be in a position of having been unjustly enriched by
10 reason of the stevedoring services which North Star provided." June
11 3, 1999 Order at 4-5.

12 Regarding North Star's Miller Act claims, Judge Holland
13 determined that "Spencer Rock was subcontractor to Nugget and,
14 therefore, North Star and Shoreside Petroleum could properly claim
15 under the Miller Act for payments herein involved." *Id.* at 14.

16 On appeal, the Ninth Circuit agreed with Nugget that Spencer Rock
17 was a material supplier, and not a subcontractor. After considering
18 the various factors set forth in *United States v. Aetna Casualty &*
19 *Surety Co. (Conveyor Rental)*, 981 F.2d 448 (9th Cir. 1992) supporting a
20 finding of subcontractor status, the Ninth Circuit held that:

21 Of the thirteen listed factors, most of the factors clearly
22 do not support such a finding as to Spencer Rock Products
23 (SRP). Although SRP supplied almost all the rock and its
24 contract with [Nugget] represented over 40% of [Nugget's]
25 total contract cost, these factors simply do not
counterbalance the others. Most notably, SRP was not
involved in any portion of NCI's overall contract and the
product supplied was in no way unique or complex-it was
merely material.

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1 *United States of America d/b/a North Star Terminal & Stevedore Co., et*
2 *al. v. Nugget Construction, Inc., et al.*, 19 Fed. Appx. 705 (9th Cir.

3 2001). The Ninth Circuit also commented on the consequence of the

4 Support Agreement executed between Nugget and Spencer Rock:

5 The Support Agreement does not affect our analysis.
6 [Nugget] agreed to provide help to SRP so that SRP could
7 complete the contract. In so doing, NCI may have exposed
8 itself to direct suit by SRP's suppliers (we express no
9 opinion on this issue because it is not before us). The
10 agreement did not, however, change SRP's involvement in the
11 project, nor require it to do any more than it had
12 originally agreed to do. SRP continued to be a
13 materialman.

14 *Id.*

15 On August 30, 2002, Judge Holland issued what could reasonably be
16 construed to be the second significant Order in these proceedings. In
17 it, Judge Holland considered plaintiff Shoreside's motion for summary
18 judgment and Nugget's and USF&G's opposition and cross-motion, as well
19 as Nugget's and USF&G's motion for summary judgment on all claims
20 brought by North Star and intervening plaintiff Metco, and North
21 Star's and Metco's opposition thereto and cross-motions. The
22 substance of these motions related exclusively to claims brought by
23 North Star, Shoreside and Metco under the Miller Act, as evidenced by
24 the first sentence of Judge Holland's order, which succinctly begins:
25 "This is a Miller Act case." August 30, 2002 Order at 2. Judge
Holland further clarified the scope of the Court's inquiry: "The
Ninth Circuit, in dicta to its opinion reversing this court, noted
that Nugget, by entering into a support agreement with Spencer and by
helping Spencer complete its contract, may have exposed itself to

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1 direct suit from Spencer Rock's suppliers. . . . The Ninth Circuit's
2 decision has left this court with the serious question as to whether
3 there are any surviving Miller Act claims." *Id.* at 3-4.

4 In considering whether there were any surviving Miller Act
5 claims, Judge Holland focused on "whether there is an implied
6 contractual relationship for purposes of the Miller Act," and,
7 specifically, whether "a direct contractual relationship with [Nugget]
8 can be implied from [Nugget's] acts despite the existence of an
9 intermediary entity [Spencer Rock] which is found to be nothing more
10 than a straw man." *Id.* at 18-19. Judge Holland concluded that
11 "[a]llthough at the time of the contract with plaintiffs Spencer was
12 not a 'paper' party, the terms of the support agreement, and Nugget's
13 acts subsequent to it, rendered it so. By virtue of the support
14 agreement and Nugget's own subsequent actions, Nugget stepped into the
15 shoes of Spencer, acting from that point onward as its own material
16 supplier, directly accepting and using the labor, equipment, and
17 services provided by North Star, Shoreside and Metco." *Id.* at 19-20.

18 On appeal, as it had once before, the Ninth Circuit reversed
19 Judge Holland's holding that Nugget was liable to North Star,
20 Shoreside and Metco under the implied-in-fact contract, "telescoping"
21 or "strawman" theory of recovery under the Miller Act. The Ninth
22 Circuit stated that:

23 The appellees [North Star, Shoreside and Metco] never
24 entered into express contracts with Nugget, and we have
25 already held that Spencer Rock acted not as subcontractor
but as a materialman on this project. . . . The appellees
contend they may nonetheless recover because they had

1 implied contracts with Nugget. We apply federal law to
2 determine whether such implied contracts existed.

3 In order to determine whether such implied-in-fact contract existed
4 under federal law, the Ninth Circuit relied on the test set forth in
5 *Fidelity & Deposit Co. of Maryland v. Harris*, 360 F.2d 402 (9th Cir.
6 1966), explaining that: "Under the Miller Act, we will look through
7 Spencer Rock, the materialman, and find an implied-in-fact, direct
8 contractual relationship between the appellees and Nugget, the primary
9 contractor, if appellees demonstrate 'subterfuge, collusion between
10 [Nugget and Spencer Rock] or circumstances indicating the
11 interposition of [Spencer Rock as a] strawm[an], presumably for the
12 purpose of insulating [Nugget and its surety company] from extensive
13 Miller Act liability." The Ninth Circuit then held:

14 On the record before us, appellees [North Star, Shoreside
15 and Metcol] have presented sufficient evidence to create a
16 material issue of fact as to subterfuge or collusion. The
17 evidence, although not conclusive, tends to show that
18 Nugget secretly converted Spencer Rock into a strawman in
19 its ongoing dealings with appellees. The support agreement
20 with Spencer Rock on its face purports to insulate Nugget
21 from Miller Act liability, yet Nugget directed Spencer Rock
22 to conceal the terms of this agreement and keep secret
23 Nugget's arrangements with Spencer Rock relating to the
24 project. Nugget also began performing some of Spencer
25 Rock's functions at the quarry and interacted directly with
some of the appellees-the extent to which remains in
dispute. We therefore reverse the district court's grant
of summary judgment and remand for further proceedings to
determine whether Nugget (and Spencer Rock) engaged in
conduct sufficient to create a direct contractual
relationship between Nugget and appellees.

23 *United States of America d/b/a North Star Terminal & Stevedore Co., et*
24 *al. v. Nugget Construction, Inc., et al.*, 126 Fed. Appx. 348, 350-51

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1 (9th Cir. 2005). The Ninth Circuit also affirmed a part of Judge
2 Holland's holding, explaining that "even if the fact-finder determines
3 that the appellees have implied-in-fact contracts based on
4 'telescoping,' that would not suffice to create terms providing for
5 attorneys fees." *Id.* at 351.

6 Following the issue of this second decision from the Ninth
7 Circuit on March 3, 2005, Judge Holland allowed North Star to amend
8 its complaint to include the state law claims that are the subject of
9 Nugget's Motion, and reopened discovery for the purpose of
10 substantiating those claims, which North Star did vigorously pursue.

11 It is against this backdrop that Nugget filed its motions seeking
12 summary judgment on the state law claims asserted by North Star,
13 Shoreside and Metco. Because the Ninth Circuit concluded that there
14 were issues of material fact involving North Star's claims under the
15 Miller Act's "strawman" or "telescoping" remedy, Nugget considered and
16 then declined to move for summary judgment on those claims, even
17 though the parties' recent discovery efforts have further confirmed
18 that there is no factual or legal basis for such recovery. However,
19 the facts that are considered material for purposes of Miller Act
20 recovery are different from the facts that are considered material for
21 purposes of recovery under the various claims North Star has alleged
22 under Alaska state law, just as the legal framework for recovery under
23 the Miller Act is very different from the legal framework for recovery
24 under North Star's Alaska state law claims. It is because of these
25

1 differences that Nugget concluded that North Star's Alaska state law
2 claims were appropriate for disposition on summary judgment.

3 Nevertheless, despite these differences, North Star's Opposition
4 makes continuing and countless references to its prior filings, from
5 its introductory "Factual Response" through its final argument that
6 punitive damages should not be dismissed, that, as shown above, have
7 no bearing on the disposition of its Alaska state law claims. As
8 discussed above, North Star's prior filings sought recovery under the
9 federal Miller Act, and only the federal Miller Act, which the Ninth
10 Circuit twice rejected upon the application of federal, not state,
11 law. Moreover, North Star's facts and arguments provided to the Court
12 in support of its Miller Act claims cannot be meaningfully applied to,
13 nor do they support, its Alaska state law causes of action.¹ This is
14 because the legal elements necessary to prove the existence of a
15 strawman under the Miller Act are different from those necessary to
16 prove the existence of an implied-in-fact contract under Alaska law
17 and, further, because the Miller Act does not contemplate the other
18 state law causes of action alleged by North Star, including its claims
19 in negligence, tort, equity and its claim for punitive damages.

20 In sum, North Star's claims under Alaska state law are proper for
21 summary judgment. Because North Star has not taken the steps
22 necessary to either establish genuine issues of material fact or

23 ¹ Although it is possible that North Star may have fortuitously supplied facts
24 in support of its previous Miller Act motions that can now be used to
25 establish its state law claims, a close reading of the affidavits and other
supporting materials it references in its present Opposition demonstrates
that they contain no facts that help North Star on that score.

1 introduce legal authority establishing that Nugget is not entitled to
2 summary judgment as a matter of law, Nugget's Motion seeking summary
3 judgment on all of North Star's Alaska state law claims should be
4 granted. For the same reason, North Star's cross-motion seeking
5 partial summary judgment should be denied.

6 ARGUMENT

7 A. North Star's Opposition fails to adduce evidence or cite legal
8 authority sufficient to withstand summary judgment

9 "When a motion for summary judgment is made and supported as
10 provided in this rule, an adverse party may not rest upon the mere
11 allegations or denials of the adverse party's pleading, but the
12 adverse party's response, by affidavits or as otherwise provided in
13 this rule, must set forth specific facts showing that there is a
14 genuine issue for trial. If the adverse party does not so respond,
15 summary judgment, if appropriate, shall be entered against the adverse
16 party." Fed. R. Civ. P. 56(e). As will be shown herein, North Star
17 fails to adduce any evidence beyond the "mere allegations" set forth
18 in its Amended Complaint. Consequently, Nugget is entitled to summary
19 judgment as a matter of law.

20 B. There was no contract, express or implied-in-fact, between Nugget
21 and North Star

22 North Star does not identify facts or law to support its argument
23 that there was an express and implied-in-fact contract between Nugget
24 and North Star. Instead, North Star directs the Court's attention to
25 its Amended Complaint and prior filings which, for the reasons
discussed above, relate to its Miller Act cause of action and which do

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1 not bear upon the presence of an express or implied-in-fact contract
2 under Alaska law.

3 Under the Miller Act, a Court may "telescope" the relationship
4 between prime contractor and second-tier subcontractor upon a finding
5 of "subterfuge, collusion between the prime contractor and
6 subcontractor or circumstances indicating the interposition of a straw
7 man, presumably for the purpose of insulating the prime contractor and
8 surety company from extensive Miller Act liability." *Harris*, 360 F.2d
9 at 411. North Star seeks to have the Court ignore the fact that this
10 test is wholly different from that prescribed under Alaska law for
11 finding an implied-in-fact contract, which requires all of the
12 elements of an express contract, including, significantly, an intent
13 to be bound by both parties. See *Reeves v. Alyeska Pipeline Serv.*
14 *Co.*, 926 P.2d 1130, 1140 (Alaska 1996).

15 North Star's Opposition does not introduce any specific fact that
16 establishes a meeting of the minds between Nugget and North Star or an
17 intent to be bound to one another. Instead, harkening back to its
18 Amended Complaint, North Star proclaims that "there are sufficient
19 admissible facts and legal grounds to conclude that Nugget, by
20 controlling, intercepting funds, taking over, and otherwise 'stepping
21 into the shoes' of Spencer Rock, became bound by Spencer Rock's
22 express contractual arrangements with North Star into which Nugget
23 stepped." North Star's Opposition at 14. Specifically, North Star
24 attempts to circumvent the requirement for a meeting of the minds by
25 arguing that "direct mutual assent between Nugget and North Star is

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1 entirely unnecessary to find Nugget liable to North Star under the
2 legal principle of contract by agency through control," and that
3 "[c]learly, there are exceptions to any requirement of 'mutual
4 assent,' as demonstrated by the implied-in-fact analysis of this Court
5 in relation to the federal telescoping cause of action." *Id.* at 15.

6 It may be true that mutual assent is not required to establish
7 the sort of relationship necessary to impose liability under the
8 federal Miller Act's telescoping or strawman remedy; however, under
9 Alaska law, an implied-in-fact contract requires the presence of
10 mutual assent or, in this case, a showing of an objective
11 manifestation between Nugget and North Star that they intended to be
12 bound to one another, a point that North Star does not dispute. See
13 *Reeves*, 926 P.2d at 1140. For all of the specific facts set forth in
14 Nugget's opening brief, there was no meeting of the minds between
15 North Star and Nugget, which is confirmed by the absence of any
16 evidence of an objective intent to be bound.

17 North Star quite rightly points out that one party's subjective
18 intent will not defeat the existence of a contract if that subjective
19 intent is belied by words and actions that objectively lead another to
20 believe a contract had been entered. Yet, North Star fails to
21 articulate a single specific fact evidencing such objective
22 manifestation to be bound and instead, in the vague and conclusory
23 fashion that defines its Opposition, declares that the evidence on
24 which Nugget relies, "when seen in a different light," "together with
25 consideration of the evidence previously presented and additional

1 evidence included within the most recent deposition testimony, permits
 2 the determination that there was mutual assent in the objective
 3 sense." North Star Opp. At 17. Such declarations, without more in
 4 the way of specific factual or legal support, cannot withstand summary
 5 judgment.

6 The Ninth Circuit previously held that North Star "never entered
 7 into express contracts with Nugget." *United States of America d/b/a*
 8 *North Star Terminal & Stevedore Co., et al. v. Nugget Construction,*
 9 *Inc., et al.*, 126 Fed. Appx. 348, 350-51 (9th Cir. 2005). This
 10 constitutes the standing law of the case. Moreover, North Star has
 11 not introduced any legal authority establishing that an implied-in-
 12 fact contract can be imposed in the absence of mutual assent, and has
 13 not introduced any fact to establish that there was mutual assent
 14 between Nugget and North Star. North Star's arguments inviting
 15 consideration of the strawman test under the federal Miller Act set
 16 forth in *Harris*, as well as its "contract by agency" arguments, are
 17 inapposite as unrelated to the legal requirements for express or
 18 implied-in-fact contract under Alaska state law. Accordingly, Nugget
 19 is entitled to summary judgment that Nugget never entered into an
 20 express or implied-in-fact contract with North Star.

21 C. North Star failed to offer any specific evidence or controlling
 22 Alaska law sufficient to withstand summary judgment against its
 23 promissory estoppel, detrimental reliance and misrepresentation
 24 and nondisclosure claims

25 1. Promissory Estoppel

In its opening brief, Nugget argued that it was entitled to
 summary judgment on North Star's promissory estoppel claim because

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1 Nugget did not make an actual promise to North Star that induced an
2 action or forbearance in reliance thereon. In support, Nugget
3 introduced and applied the testimony of Mr. Randolph and Mr. Goodwill,
4 both of whom collectively confirmed that Nugget never promised
5 anything to North Star that induced North Star to either enter into a
6 contract with Spencer Rock, or continue working under its contract
7 with Spencer Rock, against the four factors necessary to establish
8 promissory estoppel as set forth in *Brady v. State*, 965 P.2d 1 (Alaska
9 1998).

10 In opposition, North Star asserts, "[f]irst off, conduct or
11 actions including directions or deliberate silence, especially under
12 circumstances wherein one should speak up, can constitute a 'promise'
13 on which others may reasonably rely." North Star Opp. At 18 (citing
14 *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274 (Alaska 1985) and
15 *Reeves v. Alyeska Pipeline Service Co.*, 926 P.2d 1130 (Alaska 1996)).
16 North Star then recites a quote from Judge Holland's overturned August
17 30, 2002 decision as proof of

18 "sufficient evidence to create a material issue of fact" as
19 to subterfuge, collusion, and the secret conversion of
20 Spencer Rock into a "strawman" rendered unable, by that
21 conversion, to pay the claimants, while at the same time
22 Nugget induced these claimants, by its conduct and silence,
23 to do the work that Nugget needed done in order to perform
24 its contract with the Federal Government, get paid for that
25 work, and thereby siphon off more money into its own pocket
without paying Spencer Rock or the claimants.

North Star Opp. at 19.

First, neither *Zeman* nor *Reeves* stand for the proposition for
which North Star relies on those cases. In both *Zeman* and *Reeves*,

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1 there were express promises in the form of oral contracts, agreements
2 to agree and other direct communications, both written and oral, that
3 passed between the litigants that the court found may have induced an
4 action or forbearance sufficient create genuine issues of material
5 fact rendering summary judgment inappropriate. As discussed in
6 Nugget's opening brief, there were no such promises, agreements,
7 discussions, or inducements between Nugget and North Star, and North
8 Star has not identified any. Significantly, both *Zeman* and *Reeves*
9 recite the same four factors for establishing promissory estoppel on
10 which Nugget relies as set forth in *Brady*. Further, neither case
11 indicates that "deliberate silence" or an omission can constitute an
12 actual promise.

13 Second, Judge Holland's overturned findings in connection with
14 North Star's Miller Act claims do not constitute "evidence to support
15 findings that Nugget, by action, word or conduct also 'influenced' the
16 actions and legal relations of the claimants." North Star Opp. at 20.
17 The same is true of the North Star's many conclusory statements that
18 are based on Judge Holland's findings that are not supported by
19 specific facts in the current record. For instance, North Star
20 alleges: "Nugget deliberately withheld that very material information
21 from North Star, which depended upon Nugget for the truth and depended
22 upon protection under the payment bond." *Id.* Regardless of the weight
23 that the Court may assign to Judge Holland's prior findings, what
24 remains true is that, nowhere in the language cited by North Star, or
25 elsewhere in its papers, has North Star shown that Nugget made a

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1 promise to North Star that induced an action or forbearance thereon to
2 North Star's detriment. Conclusions that Judge Holland may have drawn
3 regarding Nugget's exposure under the Miller Act do not alter this
4 conclusion, which is controlled exclusively by the application of
5 Alaska state law.

6 North Star has failed to show that Nugget ever made a promise to
7 North Star that induced any action or forbearance sufficient to
8 sustain its promissory estoppel claim. Indeed, North Star reconfirmed
9 that it erroneously relied upon Nugget's payment bond, and not upon
10 any word, action or omission by Nugget. In the absence of controlling
11 legal authority or specific facts establishing a genuine issue of
12 material fact, Nugget is entitled to summary judgment as a matter of
13 law that North Star's promissory estoppel is without merit.

14 2. Detrimental Reliance

15 Again relying on its prior Miller Act filings and the prior
16 decisions relating thereto, North Star summarily declares that:
17 "Nugget, through its conduct and directions taking charge of Spencer
18 Rock's operations and North Star's loading activities and by its
19 surreptitious silence withholding the true relationship between it and
20 Spencer, affirmatively portrayed a false and deceptive situation to
21 North Star upon which North Star reasonably relied, obviously to its
22 resulting prejudice." *Id.* at 22.

23 North Star's recitation of its theories under the Miller Act with
24 its repeated accusations of Nugget "controlling Spencer Rock" and
25 "intercepting all funds otherwise due Spencer" are not sufficient to

1 withstand summary judgment on its detrimental reliance claim. In
2 order to withstand summary judgment, North Star would have needed to
3 establish specific facts establishing that Nugget made a promise by
4 action or word on which North Star relied to its detriment, per the
5 factors set forth in *Ogar v. City of Haines*, 51 P.3d 333, 335 (Alaska
6 2002), or otherwise show that Nugget was not entitled to summary
7 judgment as a matter of law. North Star failed to point to any
8 conduct - in the form of a statement, act or omission - attributable
9 to Nugget on which North Star detrimentally relied. As North Star was
10 clear to point out, it entered into its contract with Spencer Rock,
11 and continued its contract with Spencer Rock, on the erroneous belief
12 that North Star was covered by Nugget's bond, and it was this
13 misplaced reliance on the bond, and not on any conduct attributable to
14 Nugget, that North Star relied to its detriment. North Star does not
15 dispute that it must meet the elements set forth in *Ogar*, and it does
16 not dispute that it failed to satisfy those elements. Consequently,
17 Nugget is entitled to summary judgment dismissing North Star's
18 detrimental reliance claim.

18 3. North Star fails to identify any duty under which Nugget
19 was required to disclose the legal and proper support
20 arrangement between Nugget and Spencer Rock

21 The essence of Nugget's motion for summary judgment on North
22 Star's misrepresentation and nondisclosure claims was grounded in the
23 legal conclusions that the Support Agreement was a completely legal
24 agreement, that the concept of backcharging Spencer Rock for work
25 Nugget performed on behalf of Spencer Rock under Spencer Rock's

1 contract with Nugget was neither illegal nor unusual, and that Nugget
2 was not bound by any statutory or common law duty to disclose the
3 Support Agreement to Nugget, or anyone else for that matter.

4 In response, North Star asserts that

5 Randy Randolph had a duty to bring to the attention of
6 North Star the unusual and undisclosed change in the
7 relationship between Spencer Rock and Nugget, whereby
8 Nugget insured its payment rather than payment to Spencer
9 Rock or North Star for the work that North Star did. The
10 reasonable inference can be drawn that North Star, had it
11 known the true circumstances withheld from it, would have
12 taken the steps to make sure that Nugget and Spencer Rock
13 very clearly bound themselves to pay for the work, likely
14 by prepayment or payment immediately upon doing the work
15 (rather than extend credit as North Star did). Neither
16 would North Star likely have followed Mr. Randolph's
17 direction to just address the bills to Spencer Rock, had it
18 been told the truth.

19 North Star Opp. at 25-26. North Star draws these conclusions
20 following a discussion of several Alaska state law cases addressing
21 the law of misrepresentation, nondisclosure and constructive fraud.
22 The propositions for which these cases are cited are uncontroversial
23 on their own; however, the significant factual distinctions between
24 each of these cases and the instant case, which North Star fails to
25 disclose to the Court, leave the Court with a contorted and misleading
representation of their present application.

For instance, North Star relies on *Hagens Brown & Gibbs v. First
National Bank of Anchorage*, 810 P.2d 1015, 1019 (Alaska 1991), which
North Star advises is "analogous to this case," emphasizing that
negligent misrepresentation can arise upon "an omission where there is
a duty to disclose, such as 'when facts are concealed or unlikely to

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1 be discovered because of the special relationship between the parties,
2 the course of their dealings, or the nature of the fact itself.'" North Star
3 Opp. at 24. *Hagans* involved alleged misrepresentations
4 between parties whose course of dealing evidenced an attorney-client
5 relationship. See *Hagans*, 810 P.2d at 1019. North Star fails to
6 explain how the duties that run between a client and its attorney can
7 meaningfully inform the relationship between a prime contractor and a
8 second-tier vendor not in privity with one another, or how *Hagans*
9 might otherwise be analogous, which it is not. This is most likely
10 because North Star was unable to identify any authority establishing a
11 duty running from Nugget to North Star that would require Nugget to
12 make North Star aware of the contractual relationships into which
13 Nugget enters.

14 Indeed, in view of the language set forth in *Hagans*, it is a
15 reasonable conclusion that North Star does not mention any "special
16 relationship" between North Star and Nugget because there is no
17 special relationship between a prime contractor and a second-tier
18 vendor. Similarly, North Star does not discuss the "course of
19 dealing" between North Star and Nugget because North Star's corporate
20 designee indicated that the course of dealing between Nugget and North
21 Star was nothing out of the ordinary. And, finally, North Star does
22 not discuss the "nature of the fact itself" because, quite literally,
23 there is no fact in this case that was ever misrepresented to North
24 Star by Nugget and because Nugget was never under any duty to disclose
25 its Support Agreement with Spencer Rock to North Star or anyone else.

1 The other cases cited by North Star relating to its
2 misrepresentation and nondisclosure claims are equally inapposite
3 because the facts of those cases involved affirmative
4 misrepresentations, i.e., outright lies, and/or because the
5 relationship between the parties required a duty to disclose
6 information, such as a fiduciary relationship. *See Barber v. National*
7 *Bank of Alaska*, 815 P.2d 857 (Alaska 1991) (involving affirmative and
8 knowing misrepresentations made by mortgagee to mortgagor that
9 resulted in foreclosure of mortgagor's property); *Carter v. Hoblit*,
10 755 P.2d 1084 (Alaska 1988) (involving breach of a fiduciary
11 relationship by an individual who indicated to friend that he would
12 purchase property on behalf of himself and his friend yet recorded
13 deed in his name only); *Turnbull v. LaRose*, 702 P.2d 1331 (Alaska
14 1985) (involving affirmative and knowing misrepresentations made by
15 seller of real property and seller's agent to purchaser that likely
16 induced the purchaser's decision to purchase property); *Adams v.*
17 *Adams*, 89 P.3d 743 (Alaska 2004) (standing for proposition that two
18 parties involved in contract negotiation have duty to inform one
19 another of changes to draft contract language made in the course of
20 finalizing contract documents).

21 Nowhere in North Star's discussion of these cases or elsewhere in
22 this section is there an allegation that Nugget affirmatively
23 misrepresented any fact to North Star, nor is there any cited legal
24 authority establishing a duty that would require Nugget to disclose
25 the Support Agreement to North Star. As Nugget pointed out in its

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1 opening brief, had Nugget publicized the Support Agreement, it may
2 have exposed itself to suit from Spencer Rock on a theory of tortious
3 interference with contract or economic relations. Indeed, North Star
4 concedes that, "[u]nder different circumstances it might be
5 permissible for Nugget to keep its 'support' arrangements resulting in
6 the control and takeover of Spencer Rock from others," but for the
7 fact that Nugget "received a benefit of [North Star's] services."
8 North Star Opp. at 26-27. These statements highlight the fundamental
9 misstep in North Star's flawed logic chain, which is the presumption
10 that Nugget somehow benefited in its dealings with Spencer Rock.

11 In fact, as Nugget discussed in its opening brief, Nugget would
12 have been much better off had Spencer Rock been able to honor its
13 original contract with Nugget. The evidence in the record, including
14 the recent record, establishes that there was no benefit conferred
15 upon Nugget by virtue of North Star's services provided to Spencer
16 Rock. The value and benefit of that work, along with the work that
17 Nugget was forced to perform in connection with the Support Agreement,
18 was conferred upon Mr. LaPore and Spencer Rock without just
19 compensation, and was then lost when Spencer Rock failed to honor its
20 obligations.

21 North Star argues in closing that the prior decisions by Judge
22 Holland and the Ninth Circuit establish "more than sufficient evidence
23 of subterfuge, collusion, interposition of strawman, secret dealings,
24 direction, and deliberate concealment of the true situation from the
25 claimants to support that claim and thus to support North Star's state

1 law claims of misrepresentation and nondisclosure." North Star Opp.
2 at 29. This statement captures and characterizes North Star's entire
3 approach to its Opposition, namely that the prior decisions in this
4 case establish a basis on which North Star may defeat summary judgment
5 on its state law claims. This is not true. Nugget is not seeking
6 summary judgment on North Star's federal Miller Act claims; Nugget is
7 seeking summary judgment on North Star's Alaska state law claims. As
8 stated before, proof of entitlement under the telescoping remedy
9 through the federal Miller Act requires a different legal and factual
10 showing from that required to prove misrepresentation and
11 nondisclosure under Alaska state law.

12 Consequently, even if these prior decisions constituted evidence
13 on which North Star could rely to defeat Nugget's motion, which they
14 do not, (as both of Judge Holland's decisions were reversed), nowhere
15 in these decisions is there a discussion of a duty that would compel
16 Nugget to disclose its Support Agreement with Spencer Rock, and
17 nowhere is there a finding that Nugget affirmatively misrepresented
18 any fact to North Star. As Nugget pointed out in its opening brief,
19 the concept of backcharging is not only a practice with which North
20 Star has direct familiarity; backcharging has also been expressly
21 sanctioned by the Alaska Courts as a perfectly legal practice. See
22 *Howard S. Lease Constr. Co. & Assoc. v. Holly*, 725 P.2d 712 (Alaska
23 1986). Accordingly, Nugget is entitled to summary judgment on North
24 Star's misrepresentation, nondisclosure and any other claim under
25 Alaska law related thereto, including fraud and constructive fraud.

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1 D. Nugget never owed North Star any duty of care, thus, North Star's
2 negligence claims must fail

3 The essence of Nugget's motion for summary judgment on North
4 Star's negligence claims was that Nugget did not owe North Star any
5 duty of care - either at common law or by statute - that could give
6 rise to claim in negligence. The first step in the required analysis
7 under Alaska state law is to examine the relationship between the
8 parties to determine if a duty could exist. See *Mesiar v. Heckman*,
9 964 P.2d 445 (Alaska 1998). Nugget concluded, consistent with
10 prevailing Alaska law, that there was no duty that could give rise to
11 a negligence claim as between a prime contractor and second-tier
12 vendor.

13 North Star first asserts that, by virtue of the federal Miller
14 Act and federal Prompt Payment Act, "Nugget had a duty at law not to
15 seek to circumvent or insulate itself or its surety from their
16 affirmative responsibilities to secure payment and deal honestly,
17 fairly and in good faith, and in a manner consistent with the [Miller]
18 Act, toward persons like these claimants intended to be protected by
19 the Act. That is the purpose and policy behind, among other things,
20 the 'telescoping' remedy provided for in [Harris], applied by courts
21 to this case, *id.*, and in such other Ninth Circuit decisions." North
22 Star Opp. at 30-31. North Star continues that "the Prompt Payment
23 Act and Nugget's responsibilities under it referenced in the
24 correspondence from the Corps of Engineers effectively served to amend
25

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1 and supplement the Miller Act, particularly in its provisions for the
2 prompt payment of suppliers and subcontractors." *Id.* at 32.²

3 As a threshold matter, Nugget was entirely within its right to
4 receive progress payments from the Corps during the period that Nugget
5 was required to assist Spencer Rock. This is expressly permitted by
6 the Prompt Payment Act. See 31 U.S.C.A. § 3905(g) ("this section
7 shall not limit or impair any contractual administrative, or judicial
8 remedies otherwise available to a contractor or a subcontractor in the
9 event of a dispute involving late payment or nonpayment by a prime
10 contractor or deficient subcontractor performance or nonperformance by
11 a subcontractor").³

12 ² North Star relies on *United States ex rel. Cal's A/C & Electric v. Famous*
13 *Constr. Corp. & Capital Indemnity Corp.*, 34 F. Supp. 2d 1042 (W.D. La. 1999)
14 for this proposition. The essence of the court's holding in *Cal's A/C &*
15 *Electric* was that the Miller Act does not preempt a claimant from bringing
16 causes of action allowed by state law. The court based its holding upon an
17 amendment to the Prompt Payment Act, which the court concluded "served as an
18 amendment or addendum to the Miller Act." *Id.* at 1043-44. Thus, *Cal's A/C*
19 *and Electric* confirms only that state causes of action can coexist with a
20 federal Miller Act cause of action, provided that such causes of action are
21 permitted by state law; it does not support in any way North Star's
22 contention that Nugget owed North Star a duty in negligence under Alaska
23 state law.

24 ³ Regarding the Corps' correspondence on which North Star relies, North Star
25 specifically asserts that: "The Corps, as project administrator of the
contract terms and applicable law, advised Nugget and USF&G that Nugget
should not have sought or obtained progress payments from the Corps where
Nugget withheld or intended to withhold payment from a supplier or
subcontractor." North Star Opp. at 31. North Star's reliance upon this
correspondence is misguided. First, North Star conspicuously ignores the
fact that Nugget was and is legally entitled to backcharge Spencer Rock for
the work that Spencer Rock failed to perform. Second, the conclusions drawn
by the Corps in this correspondence were formulated based on the slanted
assertions of the claimants and without full view of the facts regarding
either the relationship between Nugget and Spencer Rock and Nugget and the
claimants, or Nugget's activities at the Spencer Quarry. This was confirmed
by the Ninth Circuit's reversal of Judge Holland's August 30, 2002 decision,

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1 Further, for the same reasons discussed above, North Star's
2 discussion of the "telescoping remedy" under the federal Miller Act in
3 opposition to Nugget's motion for summary judgment on North Star's
4 Alaska state law claims is entirely misplaced. The federal common law
5 construing the Miller Act creates a cause of action for parties such
6 as North Star if it can be proven that a prime contractor interposed a
7 strawman or paper party for the purpose of avoiding Miller Act
8 liability. See *Fidelity & Deposit Co. of Maryland v. Harris*, 360 F.2d
9 402 (9th Cir. 1966). The mere existence of this cause of action under
10 federal law has nothing to do with whether the Court should fashion,
11 for what would be the first occasion in any reported case in American
12 jurisprudence, a duty of care in negligence that runs between a prime
13 contractor and a second-tier vendor.

14 The cases on which North Star relies, which are federal Miller
15 Act cases, do not establish the existence of any such duty under

16 in which Judge Holland improperly afforded some weight to the Corps'
17 erroneous conclusions that were clearly disputed by Nugget. See *Anderson v.*
18 *Liberty Lobby*, 477 U.S. 242, 249 (1986) (stating that court should not weigh
19 evidence at summary judgment phase but only determine if there are genuine
20 issues as to material fact). Third, the Corps' correspondence is not the
21 product of an agency rulemaking or quasi-judicial process; indeed, this
22 correspondence does not even reflect a formal or informal final decision of a
23 contracting officer. Consequently, this correspondence is not entitled to
24 the sort of deference that North Star urges. See, e.g., *Chevron USA, Inc. v.*
25 *National Resource Defense Council*, 467 U.S. 837 (1984). Fourth, as discussed
above, neither the Miller Act nor the Prompt Payment Act precluded Nugget's
receipt of progress payments from the Corps based on Nugget's support
arrangement with Spencer Rock. In sum, neither North Star's misguided
interpretation of the Prompt Payment Act nor its reliance upon the erroneous
conclusions drawn by the Corps prior to being apprised of all relevant facts,
has a bearing upon, much less supports, North Star's assertion that Nugget
owed North Star a duty of care in negligence.

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1 Alaska state law. Perhaps most misplaced is North Star's reliance on
2 *K-W Indus. v. National Surety Corp*, 855 F.2d 640 (9th Cir. 1988). That
3 case involved a subcontractor's bad faith claim against a surety under
4 Montana state law, following a settlement of federal Miller Act
5 claims. The precise question before the court was whether the
6 application of Montana law to sureties of Miller Act bonds is
7 preempted by the Miller Act. The court held that: "[A]pplication of
8 Montana's unfair insurance claims practices law to Miller Act sureties
9 is not preempted by the federal Miller Act. Accordingly, because K-
10 W's action arises under state law, not under the Miller Act, the
11 Montana state court in which this action was originally filed has
12 subject matter jurisdiction." *Id.* at 643-44.

13 *K-W Industries* highlights the fundamental deficiency in North
14 Star's briefing, which is its incessant reliance on its prior
15 arguments relating to its claims under the federal Miller Act, the
16 prior decisions issued by Judge Holland and the Ninth Circuit
17 addressing its claims under the Miller Act, and the countless
18 references to the early record in this case relating to its claims
19 brought under the Miller Act, to defend against summary judgment on
20 causes of action controlled exclusively by Alaska state law. *K-W*
21 *Industries* could not more clearly establish that claims under the
22 federal Miller Act are distinct from claims under state law, even if
23 such claims arise out of the same operative facts and circumstances.
24 Stated another way, the court held only that federal Miller Act claims
25 and state law claims are not mutually exclusive. There is no

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1 discussion in *K-W Industries* of negligence, either under Montana or
2 Alaska law, and nowhere is there established or defined a state law
3 duty that runs between a prime contractor and second-tier vendor
4 involved in a federal construction project, which is precisely what
5 North Star would have needed in order to withstand summary judgment on
6 its negligence claim.

7 North Star's reliance on *Loyal Order of Moose, Lodge 1392 v.*
8 *International Fidelity Ins. Co.*, 797 P.2d 622 (Alaska 1990), which
9 held only that there is an implied covenant of good faith and fair
10 dealing between a surety and its obligee on payment and performance
11 bonds, is equally unhelpful to North Star. North Star relies on this
12 case to establish that "the Alaska Supreme court recognized the right
13 of intended beneficiaries under a payment or performance bond to bring
14 a tort claim of bad faith dealing against the surety on that bond."
15 North Star Opp. at 32. True as this statement may or may not be, the
16 mere existence of such a right, and North Star's reference to it, is
17 insufficient to withstand summary judgment on a negligence claim.
18 Nowhere in *Loyal Order of the Moose* is there identified any duty,
19 which, if breached, would permit North Star to recover against Nugget
20 on a theory of negligence. Further, North Star's unremarkable
21 observation that it may bring a bad faith claim against Nugget's
22 surety, USF&G, of which both Nugget and USF&G are already well-aware,
23 also fails to establish the existence of such a duty as to Nugget.

24 North Star also notes that "under Alaska law, those persons
25 [protected by the Miller Act] are within the class of persons intended

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1 to be protected by the standards of conduct contained in the Alaska
2 Unfair Claims Settlement Practices Act, AS 21.36.125, as well as
3 regulations promulgated pursuant to that Act," citing *State Farm*
4 *Mutual Automobile Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992)
5 North Star Opp. at 33. *State Farm* involved a bad faith claim by an
6 insured, Weiford, against her insurance company, State Farm, for
7 injuries she sustained following an accident with an uninsured
8 motorist. The court explained that Alaska Unfair Claim Settlement
9 Practices Act allowed Weiford a private cause of action against State
10 Farm and that "the covenant of good faith and fair dealing thus runs
11 to her from State Farm and is enforceable both in contract and in
12 tort." *Id.* at 1269. It is unclear how North Star draws the
13 conclusion that persons protected by the Miller Act are also protected
14 by AS 21.36.125 on the basis of *State Farm*, which had absolutely
15 nothing to do with the Miller Act, or why a case involving a bad faith
16 claim relating to nonpayment to an insured involving an automobile
17 accident advances North Star's negligence claim against Nugget.⁴
18 Regardless, there is nothing in *State Farm* that establishes a duty
19 between Nugget and North Star that can give rise to a claim in
20 negligence for economic loss against a general contractor.

21
22 ⁴ North Star has an independent claim against USF&G for bad faith that is the
23 subject of a separate motion. To the extent that North Star is alleging that
24 USF&G acted in bad faith, because it has not given in to North Star's
25 demands, North Star should be reminded that the Ninth Circuit has twice
determined that North Star's position as an obligee under the bond is either
non-existent or subject to serious issues of fact.

1 It is at this point in North Star's opposition that the flawed
2 analytical underpinnings to its argument are, once again, revealed:

3 Given those definite relations between the parties and the
4 strong statutory and other legal policies and standards
5 governing them applicable to this case, it seems strange
6 indeed that Nugget or USF&G would take the position that
7 they owe claimants no legal duty of care. It also seems
8 strange that Nugget and USF&G would take the position that
9 there would not be evidence of the "lesser-included"
10 concept of negligence in this case where the Court has
11 already determined that there exists strong evidence of
12 Nugget's subterfuge and deception and secretive
13 interposition of a strawman in a manner harming the
14 claimants, including North Star.

15 North Star Opp. at 34. North Star fails to cite a single authority,
16 in Alaska or otherwise, in which there was established a duty
17 supporting a claim in negligence in any way analogous to the one North
18 Star seeks to impose upon Nugget. North Star's declaration that the
19 negligence cause of action under Alaska state law is a "lesser
20 included" concept within the common law strawman cause of action under
21 the federal Miller Act, without a single legal authority to support
22 such a proposition, reflects an inferential leap of unprecedented
23 magnitude. In essence, North Star asks the Court to create a new
24 state law cause of action under a negligence theory by imposing a duty
25 between a prime contractor and a second-tier supplier that has never
before existed. *United States ex rel. Allied Building Products Corp.*
v. Federal Insurance Co., 729 F. Supp. 477, 479 (D. Md. 1990) (court
should avoid intermingling tort concepts with Miller Act claims).

Alternatively, North Star urges the Court to simply declare that
the evidence sufficient to prevail on the common law strawman cause of

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1 action under the federal Miller Act necessarily establishes liability
2 under traditional state law concepts of negligence, again, without any
3 legal authority to support such a proposition. Making these arguments
4 even more remarkable is that the "evidence" on which North Star relies
5 to oppose summary judgment is essentially limited to the findings of
6 Judge Holland that have twice been reversed by the Ninth Circuit. It
7 is a telling truth indeed that North Star chooses to rely time and
8 again on "evidence" and arguments that were raised in connection with
9 its Miller Act claims, now twice reversed, rather than anything from
10 North Star's recent discovery efforts, which were permitted precisely
11 so that North Star could substantiate its state law claims. In truth,
12 as Nugget demonstrates in its motion, the recent discovery belies
13 North Star's state law claims.

14 As Nugget outlined in its opening brief, the threshold
15 requirement for establishing a cause of action under negligence is the
16 identification of a class of cases to which a court could apply a
17 ruling and, also, that, "[i]n the first phase of duty analysis . . .
18 duty is at heart a question of policy centering on the basic
19 relationship between the parties rather than the nature of their
20 conduct on a given occasion." *Mesiar v. Heckman*, 964 P.2d 445, 448
21 (Alaska 1998). Nugget argued that the relationship between Nugget and
22 North Star was not one to which a court could apply a ruling or to
23 which a duty could attach, as the only connection between them is that
24 both worked on the same federal construction project at the same time,
25 and that there was no privity of contract between them.

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1 North Star failed to identify any class of cases to which the
2 Court could apply a ruling. North Star's summary assertion that there
3 is not a "'lack of privity' between Nugget and USF&G and North Star
4 for purposes of imposing a duty of care," is unavailing, as is North
5 Star's assertion that "more than sufficient evidence exists to permit
6 the conclusion that North Star was a particular plaintiff within an
7 identifiable class of plaintiffs at risk which Nugget and USF&G knew
8 or reasonably should have foreseen under the rule adopted by the
9 Alaska Supreme Court in *Mattingly v. Sheldon Jackson College*, 743 P.2d
10 356, 360-61 . . . and that ascertainable economic damages would ensue
11 therefrom." Again, North Star makes these assertions without legal
12 authority or specific references to the factual record.

13 The lack of contractual privity between Nugget and North Star is
14 not disputed and was, in fact, affirmed in the Ninth Circuit's second
15 order. This is an important fact because it is one among many facts
16 establishing that the relationship between Nugget and North Star is
17 not one to which a duty can or should attach. Moreover, North Star's
18 inability to properly classify the relationship between Nugget and
19 North Star as one to which a court could apply a ruling results from
20 the fact that the relationship is not special and is, in fact, too
21 attenuated for any duty to attach. As Nugget pointed out in its
22 opening brief, that relationship is not bound by any duty under
23 statute or common law or as a matter of public policy that gives rise
24 to a cause of action in negligence.

25
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1 North Star's reliance on *Mattingly* is equally unavailing. In
2 *Mattingly*, the Court established the rule that a plaintiff may recover
3 for purely economic harm on a negligence theory. The court explained
4 that: "In adopting a rule permitting recovery for purely economic
5 losses, we emphasize the role of foreseeability as it relates both to
6 the duty owed and to proximate cause." *Mattingly*, 743 P.2d at 360.
7 North Star thus asserts that "Nugget was in a unique position to know,
8 and did know, of Spencer Rock and LaPore's limited financial
9 circumstances and the likely disastrous impact Nugget's onerous
10 demands and chokehold on Spencer Rock would have on that company's
11 ability to pay the claimants." North Star Opp. at 36-37.

12 Setting aside the significant factual differences between
13 *Mattingly* and the instant case - not the least of which is the lack of
14 contractual privity between North Star and Nugget, which existed
15 between the parties in *Mattingly* - North Star overlooks the critical
16 fact that it has failed to identify any duty that Nugget owed to North
17 Star that gives rise to a cause of action in negligence. Nugget
18 entered into a support agreement with Spencer Rock and, for the
19 reasons discussed above, was not bound by any duty to disclose that
20 support agreement. For this reason alone, North Star's negligence
21 claim must fail.⁵

22 ⁵ North Star also relies on *In re Beverages International Ltd.*, 50 B.R. 273,
23 282 (U.S. Bank Ct., D. Mass. 1985) for the proposition that: "Where a
24 creditor has taken control of a debtor he assumes the fiduciary duties of
25 management and a duty to deal fairly with other creditors." In that case the
court held that a creditor was involved in "inequitable self dealing" because
of the control and decision making authority over the debtor. This control
and authority was evidenced by, among other things, the power to vote and

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1 Moreover, the suggestion that, by virtue of this agreement,
2 Nugget could have foreseen that Spencer Rock would not honor its
3 contract with North Star is offered only as speculation and
4 supposition, and is not supported by any specific fact in the record.
5 North Star offers not a single fact establishing that Nugget had
6 particular knowledge of Spencer Rock's or Mr. LaPore's finances, or
7 that Nugget entered into the support agreement for the purpose of
8 placing a "chokehold" on Spencer Rock, or that Nugget had particular
9 or advance knowledge that Mr. LaPore's would fail to pay North Star.

10 Because North Star failed to adduce any evidence or cite any
11 legal authority supporting its negligence claim, Nugget is entitled to
12 summary judgment on North Star's negligence claim as a matter of law.

13 E. There is no legal or factual basis supporting North Star's claim
14 that Nugget tortiously interfered with North Star's preexisting
15 business relations with Spencer Rock

16 North Star asserts in its Opposition that:

17 In *Mattingly*, the Alaska court reversed summary judgment
18 against that plaintiff's negligence claim and held that the
19 plaintiff was entitled to proceed to trial upon his claim
20 of negligently caused economic losses of business income,
21 profit, and increases in expenses. 743 P.2d at 361. In
22 this case, those losses would be measured in the same or
23 similar manner as North Star's previous calculation of
24 losses due to Nugget's breach of contract or alternatively,
25 tortious interference of North Star's preexisting business
26 relations with Spencer Rock. There are two categories of
27 loss: (1) non-payment under the contract or Nugget's
28 tortious interference with Spencer Rock's ability to pay
29 for the five barge loads North Star did load; and (2)

30 control more than 20% of the debtor's stock, participation in board meetings,
31 "engineering the sales of inferior inventory," and delays in recording and
32 assigning security agreements, demonstrating inequitable conduct wholly
33 absent from the instant circumstances.

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1 intercepted or rechanneled funds to itself, or that Nugget
2 deliberately interfered with and removed the work for which North Star
3 had contracted with Spencer and LaPore from North Star midway through
4 the Homer Spit project. In the absence of such evidence and,
5 specifically, evidence establishing that Nugget (i) intended to induce
6 Spencer Rock to breach its contract with North Star, and (ii) engaged
7 in conduct that induced such breach and, further, (iii) engaged in
8 conduct that was improperly or maliciously motivated, North Star's
9 tortious interference claims must fail. See *RAN Corp. v. Hudesman*,
10 823 P.2d 646, 648 (Alaska 1991) (setting forth elements of the tort of
11 intentional interference with contractual relations); *Celotex Corp. v.*
12 *Catrete*, 477 U.S. 317, 324-35 (1986) (non-moving party with the burden
13 of proof at trial must present facts establishing the predicates to
14 its cause of action in order to defeat summary judgment).

15 For the same reasons, North Star's allegation that "Nugget's
16 tortious interference with Spencer Rocks' continuation of [the
17 contract with Spencer Rock] due to Nugget's moving the loading work
18 across Resurrection Bay to suit Nugget's own purposes and charges
19 against Spencer Rock" is equally deficient. North Star Opp. at 36 n.
20 37. North Star makes this statement without any specific factual
21 reference to the record sufficient to withstand summary judgment.

22 Finally, as Nugget expressly pointed out on page 20 of its
23 opening brief, North Star's tortious interference claims are factually
24 and legally inconsistent with, not only its federal Miller Act claims,
25 but, also, the majority of its other state law claims, evidencing

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1 North Star's penchant for asserting positions when convenient without
2 regard to their factual or legal validity. There cannot be a tortious
3 inference claim among parties to the same contract. See *Odom v. Lee*,
4 999 P.2d 755, 761 (Alaska 2000). Yet, throughout its opposition,
5 North Star contends that there was an implied-in-fact contract between
6 Nugget and North Star, an implied-in-law contract between Nugget and
7 North Star, and a contract by agency between Nugget and North Star.

8 Because North Star failed to adduce any facts with sufficient
9 specificity to substantiate its tortious interference claims, Nugget
10 is entitled to summary judgment as a matter of law.

11 F. Nugget was not unjustly enriched and North Star failed to
12 introduce any specific evidence to the contrary

13 In support of its quantum meruit, unjust enrichment, quasi-
14 contract and contract implied-in-law allegations, North Star again
15 asks the Court to review its prior arguments made four years ago in
16 connection with its claims under the Miller Act, and then relies upon
17 Judge Holland's prior findings that were reversed by the Ninth
18 Circuit. North Star makes no reference to the current record and does
19 not dispute with any specific fact that Nugget suffered significant
20 losses resulting from its dealings with Spencer Rock.

21 North Star does not dispute the existence of the Support
22 Agreement between Nugget and Spencer Rock, nor does North Star dispute
23 that Nugget performed work in connection with that Support Agreement.
24 Most significant, North Star does not dispute that the cost of
25 services performed by Nugget under the Support Agreement far exceeded

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1 the cost or amount that Nugget originally agreed to pay Spencer Rock
2 pursuant to the Material Contract between Nugget and Spencer Rock.

3 The essence of North Star's position is that Nugget was unjustly
4 enriched because it backcharged Spencer Rock for the work Spencer Rock
5 did not perform and that, had Nugget not backcharged Spencer Rock for
6 this work and instead, paid Spencer Rock for the work that Nugget, in
7 fact, performed, Spencer Rock would have paid North Star for services
8 provided by North Star to Spencer Rock. Such a position is untenable.
9 There is no theory under equity that would require Nugget to suffer
10 the consequences of Spencer Rock's failure to perform under its
11 contract, and then be forced to pay for Spencer Rock's debts to a
12 third party whose only connection to Nugget is that it likewise
13 suffered from Spencer Rock's failure to abide by its contractual
14 obligations on the same construction project. North Star has not and
15 cannot refute the simple and uncontroverted fact that Nugget lost
16 substantial sums in connection with its dealings with Spencer Rock.
17 Just as North Star provided services to Spencer Rock for which it was
18 not compensated, so did Nugget, by performing the work that Spencer
19 Rock was obligated to perform and at a cost far greater than Nugget's
20 Material Contract with Spencer Rock. As stated earlier, Nugget's
21 decision to backcharge Spencer Rock was entirely legal, reasonable and
22 justified under the circumstances. Consequently, Nugget could not
23 have been unjustly enriched.

24 North Star also fails to recognize, much less dispute with
25 specific evidence, that the value and benefit of the services provided

1 by North Star were never conferred upon Nugget. Nugget did not
 2 receive any service or good from Spencer Rock that was not accounted
 3 for either through direct payment to Spencer Rock or through an
 4 appropriate backcharge for the work that Spencer Rock failed to
 5 perform.⁶ North Star has not introduced any evidence that Nugget
 6 agreed to assume responsibility for Spencer Rock's debts to North
 7 Star. Absent a benefit conferred upon Nugget by North Star, there can
 8 be no claim for quantum meruit or related claims in unjust enrichment.

9 Finally, North Star misunderstands Nugget's argument that a party
 10 to an express contract may not seek recovery on extra-contractual
 11 theories such as quantum meruit or implied contract. North Star
 12 freely admits it had an express contract with Spencer Rock. It is
 13 this contract, North Star's express contract with Spencer Rock, that
 14 precludes North Star from seeking recovery on extra-contractual
 15 theories. See *Mitford v. de Lasala*, 666 P.2d 1000, 1006 n. 1 (Alaska
 16 1983). Nugget has never indicated, much less contended, that there
 17 was any kind of contract between Nugget and North Star. If anyone
 18 here is engaging in sophistry, it is North Star, which, without any
 19 reservation, argues inconsistent and alternative theories of recovery.
 20 See North Star's Opp. at 40-41 ("As we stated before, only in the

21 ⁶ North Star's opposition asserts that, among Nugget's representations that
 22 are "plain wrong," none of Nugget's payments to Spencer Rock were for North
 23 Star's barge loading. North Star Opp. at 6. North Star fails to consider
 24 that the Corps allowed pre-payment of rock after it was quarried, which
 25 payment included all of the cost of delivering the rock to Nugget's barge.
 Accordingly, Nugget's payments to Spencer Rock could have and should have
 been used to pay North Star, Shoreside and Metco. The disbursement of these
 funds to Spencer Rock's bank rather than North Star is a question that should
 be directed to Spencer Rock and Mr. LaPore, not Nugget.

1 event that it is found after trial that the arrangement which Spencer
2 Rock made with North Star is not enforceable against Nugget, as
3 Spencer's principal or otherwise, would North Star seek to collect
4 upon these alternative claims based on quasi-contract.").

5 Accordingly, for the reasons above, Nugget is entitled to summary
6 judgment on North Star's quantum meruit, unjust enrichment,
7 restitution, quasi-contract and contract implied-in-law claims.

8 F. North Star fails to adduce any evidence in support of its
9 equitable subordination or constructive trust claims

10 North Star's Opposition to Nugget's motion on North Star's
11 equitable subordination and constructive trust claims is confined to a
12 single paragraph, yet North Star asserts that "Nugget's non-showing as
13 to these two claims now is far too thin a reed upon which to support
14 summary judgment in its favor." North Star Opp. at 42. North Star
15 again forgets that under *Celotex* it, and not Nugget, has the burden of
16 establishing the facts necessary to support its claims, which it has
17 not done.

18 In its opening brief, Nugget set forth the legal requirements for
19 both a constructive trust and equitable subordination claims. Both of
20 these claims turn on a finding that one is unfairly or unjustly
21 holding or retaining the property of another. As described above,
22 North Star failed to adduce any evidence establishing that Nugget is
23 unjustly holding the property of North Star. It is not Nugget, but
24 Spencer Rock, that has unfairly retained North Star's funds. Nugget
25 does not disagree with North Star that it was not paid for its
services; however, those services were provided under a contract with

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1 Spencer Rock. Consequently, it is toward Spencer Rock that North Star
2 should direct its efforts in recovering any funds.

3 As is true of North Star's other equitable claims, North Star has
4 failed to identify any specific fact establishing that a constructive
5 trust or the doctrine of equitable subordination should operate here
6 in a manner requiring Nugget to pay for the debts of Spencer Rock.
7 Accordingly, Nugget is entitled to summary judgment on these claims.

8 G. North Star fails to offer any fact or law establishing that an
9 agency relationship was formed between Nugget and Spencer Rock
10 under Alaska law

11 The bulk of North Star's opposition to Nugget's motion for
12 summary judgment on North Star's agency claim is devoted to
13 establishing that Judge Holland incorrectly held that contracts
14 entered into by an agent cannot be construed as binding on an
15 undisclosed principal.

16 Judge Holland's holding here is a conclusion of law, not based on
17 any fact in the prior record. It is a holding that represents Judge
18 Holland's interpretation of the law set forth in *Jensen v. Alaska*
19 *Valuation Service, Inc.*, 688 P.2d 161 (Alaska 1984), and that
20 represents the standing law of this case. North Star believes that
21 Judge Holland's interpretation of *Jensen* is wrong and that North
22 Star's interpretation of a Minnesota state law case, *A. Gay Jensen*
23 *Farms v. Cargill, Inc.*, 309 N.W.2d (Minn. 1981), "should apply to this
24 case, both under state law and the Miller Act." North Star Opp. at
25 45.

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1 Significantly, Nugget's opening brief comprehensively set forth,
2 with specific citations to the factual record, the reasons why an
3 agency relationship never existed between Nugget and Spencer Rock
4 under Alaska law. North Star does not respond to these arguments.
5 Instead, North Star asserts that the specific evidence on which Nugget
6 relies mischaracterizes the record, yet without explaining why, and
7 then directs the Court to review "the fuller facts from [the prior
8 record] and other summary judgment filings and Court decisions, as
9 previously referenced and incorporated herein, going back to 1998."
10 North Star Opp. at 45. North Star then rounds out its cross-motion in
11 the same summary fashion that characterizes its entire brief by
12 proclaiming that the prior record "amply support[s] North Star's
13 position as to the existence of an agency relationship between Nugget
14 and Spencer Rock as a result of Nugget's control of Spencer Rock's
15 operations and funding."

16 North Star's continuing and unfocused references to the prior
17 record regarding its federal Miller Act claims, which do not at all
18 address the subject of Nugget's motion for summary judgment on North
19 Star's agency cause of action under Alaska state law, are insufficient
20 to withstand summary judgment, much less support a cross-motion for
21 summary judgment. In order to oppose or prevail on a cross-motion for
22 summary judgment, North Star would need to set forth controlling law
23 and then, with specific citations to the record, establish that an
24 agency relationship existed between Nugget and Spencer Rock. North
25 Star failed to do this and, on this basis alone, its cross-motion

1 should be denied and Nugget's motion for summary judgment should be
2 granted. This conclusion remains unchanged if the Court accepts North
3 Star's interpretation of *Cargill*, which it should not. Even if the
4 Court were to decide that contracts entered into by an agent can be
5 construed as binding on an undisclosed principal, North Star fails to
6 establish that Nugget was, at any time, Spencer Rock's principal,
7 disclosed or undisclosed, and fails to refute the specific evidence
8 supporting Nugget's motion that there was never an agency relationship
9 between Nugget and Spencer Rock.

10 Finally, North Star urges that a "second basis for finding an
11 agency relationship between Nugget and Spencer Rock, as a matter of
12 law" exists. This argument rests on Mr. Randolph's statement that Mr.
13 LaPore authorized Mr. Randolph to provide direction to North Star
14 regarding the loading and scheduling of the barges. See North Star
15 Opp. at 46. Notably, North Star cites no factual or legal authority
16 to support this "second basis," or, specifically, how it is that an
17 authorization given by Mr. LaPore to Mr. Randolph would render the
18 former the agent of the latter. Such an argument is not only contrary
19 to the law of agency, but is also contrary to common sense.

20 Equally untenable and inapposite is North Star's parting shot
21 that Mr. LaPore's authorization demonstrates that Mr. Randolph
22 "substituted himself and Nugget for Spencer Rock for that part of the
23 work." *Id.* As North Star's Mr. Goodwill would agree, Mr. Randolph
24 conducted himself appropriately regarding the loading and scheduling
25

1 of the barges, and in this case, in accordance with the Support
2 Agreement.

3 Because North Star has completely failed to support its cross-
4 motion for summary judgment with citations to the record or
5 controlling legal authority, its cross-motion should be denied. For
6 the same reason, and because North Star failed to refute the specific
7 facts or legal authority set forth in Nugget's opening brief, Nugget's
8 motion for summary judgment that there was never an agency
9 relationship between Nugget and Spencer Rock should be granted.⁷

10 H. Nugget is entitled to summary judgment on North Star's bad faith
11 and punitive damages claim as there is no clear and convincing
evidence in the record of bad faith or outrageous conduct.

12 In opposition to Nugget's motion on for summary judgment on North
13 Star's bad faith and punitive damages claims, North Star goes beyond
14 its repeated request for the Court to review the bulk of the prior

15 ⁷ On April 28, 2006, Nugget filed a motion for summary judgment on North
16 Star's state law agency cause of action. Rather than wait to file an
17 opposition and/or cross-motion, on May 1, 2006 North Star filed a motion for
18 summary judgment on its agency claims, which Nugget opposed on May 19, 2006.
19 North Star then filed an opposition and cross-motion for summary judgment on
20 the same agency cause of action that was the subject of both Nugget's April
21 28, 2006 motion and North Star's own May 1, 2006 agency motion. Given the
22 fact that North Star incorporated by reference what amounts to the entire
23 factual record in this case in support of its opposition and cross-motion to
24 Nugget's April 28, 2006 motion for summary judgment, Nugget is loath to
25 further burden the Court with any further "incorporations by reference."
Unfortunately, North Star's approach to motions practice in this case, which
has needlessly confused matters by requiring the parties to present the same
arguments relating to the same causes of action in motions for summary
judgment pending at the same time, has rendered incorporation by reference of
Nugget's May 19, 2006 opposition to North Star's motion for summary judgment
on its agency cause of action unavoidable. Consequently, Nugget respectfully
requests that the Court review the arguments presented in its May 19, 2006
opposition to North Star's motion for summary judgment on agency in further
support of the arguments raised herein.

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1 record and, incredibly, incorporates by reference "the future filings
2 in response to USF&G's separate motion for summary judgment against
3 punitive damages" filed by USF&G. North Star Opp. at 48. This
4 improper manner of motions practice is nowhere permitted by law or
5 this Court's rules. Should Nugget be expected to reply to an argument
6 that has not been timely filed? As the answer is: no, North Star's
7 improper incorporation of its "to be filed" brief should be stricken.

8 Again, without any specific reference to the factual record,
9 North Star states that:

10 With respect to evidence of Nugget's outrageous behavior,
11 it can only be concluded that the evidence of Nugget's
12 disregard toward Spencer Rock's interests, as part of a
13 takeover including an apparent master plan to gain future
14 rights to the quarry, together with subterfuge, secrecy,
15 deception, interposition of a strawman in which Nugget
16 engaged in its dealings with these claimants and others,
17 including Chugach Rock Corporation . . . could support jury
18 finding of outrageous conduct and punitive damages.

19 North Star Opp. at 48. North Star's opposition here again is woefully
20 inadequate and fails to meet the standards sufficient to withstand
21 summary judgment. There is no specific evidence of a master plan, or
22 of a takeover attempt to gain future rights to the quarry, or of
23 secrecy, subterfuge or deception. There are only North Star's bald
24 and unsupported assertions of such claims. The comments of the court
25 in *United States ex rel. Allied Building Products Corp. v. Federal Insurance Co.*, 729 F. Supp. 477, 479 (D. Md. 1990) are particularly incisive here. In that case, the court was confronted with a claim for punitive damages under tort theories that were introduced within

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1 the larger context of a Miller Act claim. The court held:

2 The Court is convinced that there is no basis for the
3 assertion of a claim of punitive damages in connection with
4 the alleged breach of contract, in the absence of any
5 viable separate and independent tort. Therefore, the
6 punitive damages claim will be disallowed as an amendment
7 to the complaint . . . and it will be dismissed with
8 prejudice. . . .

9 Finally, the Court notes that the Miller Act was
10 intended as a simple remedy for unpaid subcontractors on
11 federal building projects. The essence of the Miller Act
12 case is a breached contractual obligation. To allow such a
13 case to turn into a tort case would frustrate the purpose
14 of the Miller Act by complicating the litigation immensely.
15 Therefore, the Court would not, in the exercise of its
16 discretion, entertain the sort of pendant claims sought
17 here to be asserted, even if they had merit *prima facie*.

18 *Id.*; see also *United States ex rel. Krupp Steel Products, Inc. v.*
19 *Aetna Ins. Co.*, 923 F.2d 1521 (11th Cir. 1991) (citing *Allied Building*
20 *Products Corp.*).

21 For all the reasons discussed herein, there was nothing improper
22 about the support arrangement between Nugget and Spencer Rock, and the
23 record is clear that this arrangement was precipitated only by Spencer
24 Rock's anticipated difficulty to perform under the Material Contract.
25 Further, North Star forgets that Nugget has twice prevailed in these
proceedings against North Star's unsubstantiated allegations and
misstatements of law. Rightfully defending oneself against baseless
and invented claims is not an outrageous act or an act of bad faith.

In sum, there is no evidence in the record, much less clear and
convincing evidence in the record, of bad faith, recklessness,
outrageous conduct, or improper motive on the part of Nugget. Nugget
conducted itself as would any prudent contractor faced with the

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1 prospect of a material supplier failing to hold up its end of the
2 bargain. Nugget entered into the Support Agreement, resulting in
3 significant additional expense to Nugget, to ensure that its contract
4 with the federal government would be timely and adequately performed.

5 In the absence of any clear and convincing evidence of bad faith,
6 or that would otherwise support North Star's entitlement to punitive
7 damages, Nugget is entitled to summary judgment as a matter of law on
8 North Star's bad faith and punitive damages claims.

9 Conclusion

10 "One of the principal purposes of the summary judgment rule is to
11 isolate and dispose of factually unsupported claims or defenses."
12 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-35 (1986). "The plain
13 language of Rule 56(c) mandates the entry of summary judgment, after
14 adequate time for discovery and upon motion, against a party who fails
15 to make a showing sufficient to establish the existence of an element
16 essential to that party's case, and on which that party will bear the
17 burden of proof at trial." *Id.* at 323. "In such a situation, there
18 can be 'no genuine issue as to a material fact,' since a complete
19 failure of proof renders all other facts immaterial." *Id.* at 323-34.
20 Specifically, a properly supported summary judgment motion will not be
21 defeated "without offering any significant probative evidence tending
22 to support the complaint. . . . Discredited testimony is not
23 [normally] considered a sufficient basis for drawing a contrary
24 conclusion. Instead, the [non-movant] must present affirmative
25 evidence in order to defeat a properly supported motion for summary

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1 judgment. This is true even where the evidence is likely to be within
2 the possession of the defendant, as long as the plaintiff has had a
3 full opportunity to conduct discovery." *Anderson v. Liberty Lobby,*
4 *Inc.*, 477 U.S. 242, 256 (1986). Further, a court has "no duty to comb
5 the record to find some reason to deny a motion for summary judgment."
6 *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030-31 (9th
7 Cir. 2001).

8 North Star was afforded adequate time for discovery. Indeed,
9 after it was established by the Ninth Circuit that issues of fact
10 precluded summary judgment on North Star's strawman claims, North Star
11 was allowed to amend its complaint to include its state law causes of
12 action that were not previously pled, and allowed ample time in
13 discovery to substantiate those state law claims.

14 North Star's opposition demonstrates a complete failure of proof,
15 in which North Star offers nothing more than the allegations set forth
16 in its Amended Complaint. Instead of an opposition with citations to
17 its recent discovery efforts, North Star's opposition is replete with
18 vague and wholesale references to the prior record in support of its
19 Miller Act claims, which are claims unrelated to the state law claims
20 that are the subject of Nugget's motion. The reasonable conclusion to
21 be drawn is that North Star resorts to the prior record because there
22 is nothing in the current record to support its state law claims,
23 which also explains why North Star offers only bare allegations upon
24 which North Star then builds inference upon unreasonable and
25 unsubstantiated inference in lieu of actual and specific facts. It is

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1 facts and evidence that North Star was required to adduce, and it is
2 the absence of such facts and evidence that requires that summary
3 judgment be granted in Nugget's favor on all of North Star's state law
4 claims.

5
6 Dated: June 5, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th
day of June, 2006, a true and correct
copy of the foregoing was served

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